

**To:** Tal Grinblat([tgrinblat@lewitthackman.com](mailto:tgrinblat@lewitthackman.com))  
**Subject:** U.S. Trademark Application Serial No. 97151789 - - 9695-3  
**Sent:** November 10, 2022 04:54:18 PM EST  
**Sent As:** [tmng.notices@uspto.gov](mailto:tmng.notices@uspto.gov)

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**Attachments**

[97122502](#)  
[5185876](#)

**United States Patent and Trademark Office (USPTO)  
Office Action (Official Letter) About Applicant's Trademark Application**

**U.S. Application Serial No.** 97151789

**Mark:**

**Correspondence Address:**

Tal Grinblat  
LEWITT, HACKMAN, SHAPIRO, MARSHALL & HARLAN  
16633 VENTURA BLVD., SUITE 1100  
ENCINO CA 91436 UNITED STATES

**Applicant:** FOTO-KEM INDUSTRIES, INC.

**Reference/Docket No.** 9695-3

**Correspondence Email Address:** [tgrinblat@lewitthackman.com](mailto:tgrinblat@lewitthackman.com)

**SUSPENSION NOTICE  
No Response Required**

**Issue date:** November 10, 2022

Pursuant to TMEP §716.01, applicant is advised of the following status of the application.

**In an Office Action issued on September 19, 2022, the following issues were outstanding with this application:**

- Section 2(d) - Likelihood of Confusion Refusal - Partial Refusal
- Potential Section 2(d) Refusal - One Pending Application

- Identification Of Goods And Services Indefinite And Overly Broad – Amendment Required
- Amended Mark Description Required

**On September 29, 2022, applicant responded to the Office Action. In the Response, applicant:**

- Amended the identification of goods and services;
- Provided arguments against the Section 2(d) Refusal; and
- Amended the mark description.

**The trademark examining attorney has thoroughly reviewed applicant’s response and has determined the following:**

1. Applicant's identification still includes indefinite and overly broad wording. Accordingly, the identification requirement is *maintained and continued*;
2. Applicant's argument against the Section 2(d) Refusal is not persuasive. Accordingly, the Section 2(d) Refusal is *maintained and continued*;
3. Application Serial No. 97122502 is still pending, and action on the instant application is suspended pending final disposition of the application; and
4. Applicant's amended mark description is accepted. Accordingly, the Mark Description Requirement is *satisfied*.

#### **Preliminary Response to Applicant’s Arguments**

Applicant argues that a side-by-side comparison of the marks shows differences in appearance, shape and meaning.

When comparing marks, “[t]he proper test is not a side-by-side comparison of the marks, but instead whether the marks are sufficiently similar in terms of their commercial impression such that [consumers] who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 1373, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (quoting *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1368, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012)); TMEP §1207.01(b). The proper focus is on the recollection of the average purchaser, who retains a general rather than specific impression of trademarks. *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, at \*4 (TTAB 2020) (citing *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016)); *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018); TMEP §1207.01(b); see *In re St. Helena Hosp.*, 774 F.3d 747, 750-51, 113 USPQ2d 1082, 1085 (Fed. Cir. 2014). While consumers may perceive slight differences in the marks, purchasers with general recollections of the marks are likely to recall the similar appearance created by the spiral and be confused about the source of the goods and services.

Additionally, determining likelihood of confusion is based on the description of the goods and/or services stated in the application and registration at issue, not on extrinsic evidence of actual use. See *In re Detroit Athletic Co.*, 903 F.3d 1297, 1307, 128 USPQ2d 1047, 1052 (Fed. Cir. 2018) (citing *In re i.am.symbolic, llc*, 866 F.3d 1315, 1325, 123 USPQ2d 1744, 1749 (Fed. Cir. 2017)). In this case, the registration uses broad wording to describe a mobile application for creating and editing video clips, and therefore, does not limit the goods to non-professional users. Moreover, the record evidence establishes that entities often offer software that allows users to create, edit and delivery digital content.

Accordingly, applicant's arguments are unpersuasive to overcome the refusal and the Section 2(d) Refusal is ***maintained and continued***.

#### **APPLICATION IS SUSPENDED**

**The application is suspended** for the reason specified below. *See* 37 C.F.R. §2.67; TMEP §§716 *et seq.*

The pending application below has an earlier filing date or effective filing date than applicant's application. If the mark in the application below registers, the USPTO may refuse registration of applicant's mark under Section 2(d) because of a likelihood of confusion with the registered mark. 15 U.S.C. §1052(d); *see* 37 C.F.R. §2.83; TMEP §1208.02(c). Action on this application is suspended until the prior-filed application below either registers or abandons. 37 C.F.R. §2.83(c). Information relevant to the application below was sent previously.

- U.S. Application Serial No. 97122502

**Suspension process.** The USPTO will periodically check this application to determine if it should remain suspended. *See* TMEP §716.04. As needed, the trademark examining attorney will issue a letter to applicant to inquire about the status of the reason for the suspension. TMEP §716.05.

**No response required.** Applicant may [file a response](#), but is not required to do so.

/Danielle Anderson/  
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(2) DESIGN ONLY



**Mark Punctuated**

**Translation**

**Goods/Services**

- IC 009. US 021 023 026 036 038.G & S: Downloadable software for creating, producing, editing, manipulating, transmitting, uploading, downloading, and sharing electronic media, multimedia content, videos, movies, pictures, images, text, photos, user-generated content, audio content, and information via the Internet and other communications networks. FIRST USE: 20211008. FIRST USE IN COMMERCE: 20211008
- IC 038. US 100 101 104.G & S: Transmission of electronic media, multimedia content, videos, movies, pictures, images, text, photos, user-generated content, audio content, and information via the Internet and other communications networks. FIRST USE: 20211008. FIRST USE IN COMMERCE: 20211008
- IC 041. US 100 101 107.G & S: Entertainment services, namely, providing an online interactive database of videos and user generated content containing digital images, photos, text, graphics, music, audio, video clips, multimedia content, and visual and audio performances; providing music videos over the Internet or other communications networks. FIRST USE: 20211008. FIRST USE IN COMMERCE: 20211008
- IC 042. US 100 101.G & S: Creating a virtual environment in the nature of an online community for registered users to create, produce, edit, manipulate, transmit, share, and comment on videos or other electronic media. FIRST USE: 20211008. FIRST USE IN COMMERCE: 20211008

**Mark Drawing Code**

(2) DESIGN ONLY

**Design Code**

260126

**Serial Number**

97122502

**Filing Date**

20211112

**Current Filing Basis**

1A

**Original Filing Basis**

1A

**Publication for Opposition Date**

**Registration Number**

**Date Registered**

**Owner**

(APPLICANT) The Apex App, Inc. CORPORATION CALIFORNIA 1550 Parkside Drive, Suite 130 1550 Parkside Drive, Suite 130 Walnut Creek CALIFORNIA 94596

**Priority Date**

**Disclaimer Statement**

**Description of Mark**

Color is not claimed as a feature of the mark. The mark consists of a spiral with two revolutions.

**Type of Mark**

TRADEMARK. SERVICE MARK

**Register**

PRINCIPAL

**Live Dead Indicator**

LIVE

**Attorney of Record**

Robert S McArthur

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